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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Date	07/13/2009

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Convertabath, Inc.

Mark: Convertabath

Serial No. 77/443,743

Filed: April 19, 2008

Trademark Law Office 116

Examining Attorney: Doritt Carroll

**RESPONSE TO OFFICE ACTION**

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In an Office Action dated July 17, 2008, the Examining Attorney refused to register Applicant's **CONVERTABATH** mark (App. No 77/443,743) under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the mark is likely be confused with a prior registration. Applicant respectfully submits that no likelihood of confusion exists between Applicant's mark and requests that the Examining Attorney allow registration of Applicant's mark for the reasons set forth below.

Applicant verifies that all statements made are true, of its own knowledge, and that all statements made on information and belief are believed to be true.

### **REMARKS**

Applicant respectfully requests reconsideration of the Application. The registration of the subject mark was originally refused under 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq* on the grounds that the mark.

#### **I. AMENDMENTS AND IDENTIFICATION OF GOODS AND SERVICES**

In response to an Office Action from the Trademark Examining Attorney dated July 17, 2008, please amend the application to read as follows:

A. "Kits containing parts and instructions for converting existing bathtubs into a walk-in shower, namely shower doors and bathtub surroundings in International Class 011.

B. "Repair, refinishing and resurfacing of kitchen and bathroom surfaces, namely bathtubs, showers, sinks, vanities, ceramic tile, countertops, fiberglass, cultured marble, granite, acrylic, porcelain fixtures, wood, vinyl, glass, appliances and metal surfaces; remodeling of

bathrooms, namely, remodeling of fixtures to convert bathtubs into showers; installation of acrylic tubliner and wall systems in International Class 037.<sup>1</sup>

## **II. THE EXAMINING ATTORNEY HAS NOT COMPORTED WITH THE ANTI-DISSECTION RULE.**

As the United States Supreme Court recognized more than eighty years ago:

The commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail. For this reason, it should be considered in its entirety.

*In re P.D. Beckwith, Inc.*, 252 U.S. 538, 545-46, 40 S. Ct. 414 (1920). Indeed, the anti-dissection rule is most important when attempting to determine whether one mark is likely to cause confusion with another. As the Ninth Circuit Court of Appeals has held, a composite mark is not evaluated by viewing its discrete elements. Rather, a composite mark must be viewed “as a whole, as it appears in the marketplace.” *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902 (9<sup>th</sup> Cir. 1995).

Here, the Examining Attorney has done precisely what the Courts have proscribed. He has examined each element of the Applicant’s composite mark, and has determined that, simply because one of the elements of the composite mark is similar to the registered marks, confusion in the marketplace is likely. In conducting this analysis, the Examining Attorney has not

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<sup>1</sup> Please note that Applicant, CONVERTABATH, converts bath tubs into showers, while Convertatub converts tubs into whirlpools, thus the two companies do not do the same work. Moreover, Convertatub only sells parts necessary to convert tubs into whirlpools while CONVERTABATH does actual remodeling services. See Convertatub website: <http://www.convertatub.com/>; CONVERTABATH website <http://www.convertabath.com/> (last visited June 20, 2009) and attached Exhibits confirming said.

Therefore, assuming *arguendo* that the consumer actually was confused by the two marks, and assuming *arguendo* that both companies were known outside their respective territories of Arizona and Florida, no harm would come of the confusion as a consumer looking to convert a bathtub into a whirlpool that mistakenly contacts CONVERTABATH would not be able to have the desired services performed, and a consumer that mistakenly contacts Convertatub looking to convert a bathtub into a shower would not be able to have those services performed either.

comported with the anti-dissection rule. Further, the Examining Attorney's analysis does not fall within any recognized exceptions to the anti-dissection rule.<sup>2</sup>

When the Examining Attorney views the Applicant's marks as a whole, as he must, he should conclude that no confusion is likely with the Competing Marks or Prior Applications.

### **III. THE MARKS ARE DISSIMILAR WHEN CONSIDERATION IS GIVEN TO THE TRILOGY OF SIGHT, SOUND AND MEANING.**

The test for likelihood of confusion involves the consideration of various factors. *In re E.I. DuPont de Nemours & Co.*, 456 F.2d 1357 (C.C.A.P. 1973) (Identifying 13 separate factors). The similarity of the marks, by itself, is an insufficient basis to deny registration where other factors suggest that no likelihood of confusion will arise. *See Astra Pharmaceutical Products, Inc. v Beckman Instruments*, 220 USPQ 609 (1983), (aff'd 718 F.2d 1201 (1<sup>st</sup> Cir. 1983) (Use of even the same word is not dispositive; likelihood of confusion is determined in the context of all relevant factors).

There can be little question that a major factor for consideration is the similarity or dissimilarity of the marks—in their entirety—as to appearance, sound, connotation, and commercial impression. *See DuPont* at 1361. The trilogy of sight, sound and meaning must be considered in its totality. For instance, even where two marks being compared were similar in sound, because they are not similar in appearance and meaning, they were not deemed to confusingly similar. *In re Conti*, 220 USPQ 745 (TTAB 1983) (“shear perfection” for beauty salon services not confusingly similar to “sheer perfection” for leg makeup).

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<sup>2</sup> The Trademark Trial and Appeals Board has carved out a limited exception to the anti-dissection rule in determining descriptiveness. *In re Hester Indus., Inc.*, 230 USPQ 797, n.5 (TTAB 1986). However, the Trademark Trial and Appeals Board made clear that the only appropriate time when an Examining Attorney may analyze each discrete component of a composite mark is “to determine that the term in its entirety is descriptive.” *Id.*

**A. The Marks Are Not Visually Similar.**

The anti-dissection rule mandates that the marks be considered in their entirety in determining the likelihood of confusion. It has long been held that confusion is not automatically likely simply because a junior user appropriates a mark that contains portions of another's registered mark. *Colgate Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400 (C.C.P.A. 1970) (PEAK PERIOD mark used for deodorant not confusingly similar to PEAK mark used for dentifrice); *In re Merchandising Motivation, Inc.*, 184 USPQ 364 (TTAB 1974) (MMI MENSWEAR not confusingly similar to MENSWEAR). As the Middle District Court for Louisiana recognized:

Furthermore, the similarity of design must be determined by considering the overall impression created by the mark as a whole rather than simply comparing individual features of the mark. (citation omitted). Thus, it is necessary to consider the full names of the parties to determine whether the defendant's name invites or avoids confusion.

*Safeway Stores, Inc., v. Safeway Insurance Co.*, 657 F. Supp 1307 (M.D. La 1988).

Here, the Examining Attorney has inappropriately focused solely on the word "Convert" in the Competing Mark because a homophonic representation of that word ("CONVERT") comprises the Applicant's Mark. Yet, the addition of "TUB" in the Competing Mark, its absence in Applicant's mark the Competing Mark, and the creative and arbitrary spelling of the word in Applicant's mark ("CONVERTABATH") demonstrate that a visual disparity exists in the marketplace. *Id.*

More importantly, however, are the differentiating design elements contained in both marks. Here, it does not appear that the Examining Attorney had appropriately evaluated the subject marks in their entireties. Indeed, the Examining Attorney appears to have ignored the fact that subject marks contain significant differentiating design elements, which create a distinct

commercial impression in the marketplace. For example, the “CONVERTABATH” mark has an elongated swoosh for the “A” and the top of the forms a showerhead, while the “Convert-a-tub” “A” is merely the letter “A” in bold lettering.

The Trademark Trial and Appeal Board’s primary reviewing court has recognized:

We are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with practicalities of a commercial world, with which the trademark laws deal.

*Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 221 U.S.P.Q.2d 1388, 1391 (Fed. Cir. 1992) (citing *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1403 (CC Pa. 1969); see also *In re Electrolyte*, 929 F.2d at 947 (“the spoken or vocalizable element of a design mark, taken without the design, need not of itself serve to distinguish the goods. The nature of stylized letter marks is that they partake of both visual and oral indicia and both must be weighed in the context in which they occur.”) (citing *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 760, 204 U.S.P.Q. (BNA) 697, 699 (CCPA 1980)). Here, it does not appear that the Examining Attorney has taken into account the “context” in which the marks will be encountered.

*In re Electrolyte* is particularly instructive as there, two users employed the mark “K+” for use in connection with sale of dietary potassium supplements. One of the marks added the abbreviation “EFF” as an abbreviation for “effervescent.” 629 F.2d at 647. The other mark employed a letterbox design element. The Federal Circuit Court of Appeals held that these distinctions were sufficient- - even in light of use with exactly the same goods - - to overcome any likelihood of confusion:

We conclude that the TTAB erred in its dominant focus on the K+ in both marks, to the substantial exclusion of the other design elements of both marks. Electrolyte’s mark is a composite of which the design is a significant feature thereof. The EFF in the registrant’s mark is also



significant. Although the symbols and abbreviations can be pronounced, they are not identical, and the design of the marks is substantially different. We conclude that Electrolyte's mark, viewed as a whole, serves to distinguish its goods from those of others.

629 F.2d at 648.

Precisely the same analysis applies in this case. The Applicant's Mark contains a significant word that simply is not present in the Competing Marks. And some of the Competing Marks contains a significant design element not present in Applicant's Mark. In addition, as should be obvious, the Competing Marks lacks the second element of the Applicant's Mark, "BATH." Thus, when the marks are viewed in their totality, no likelihood of confusion exists. *Id.*

**B. The Marks Do Not Sound Similar.**

While it has been said, "trademarks are like small children are not only seen but heard," *Grotian v. Steinway & Sons*, 523 F.2d 1331 (2<sup>nd</sup> Cir. 1975), phonetic similarity is merely one element to consider in determining if likelihood of confusion exists. *See, Lebow Brothers, Inc.*, 503 F. Supp. at 210. (LEBOW mark used in connection with the manufacture and sale of clothing not confusingly similar to LEBOLE mark used in connection with the sale of clothing). Here, although the competing marks share a common sounding element ("Convert"), there can be little legitimate question that the Applicant's mark ("CONVERTABATH") creates a wholly different sound than Competing Marks. *W.L. Gore & Assoc. v. Johnson & Johnson*, 882 F. Supp. 1454 (D. Del. 1995) (Preliminary injunction denied as "Easy Slide" creates a different sound from "Easy Glide.").

**C. The Marks Have Different Meanings.**

The meaning of a mark can be determined from standard dictionary definitions. *Colgate Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400 (C.C.P.A. 1970). In this case, just as the

sight and sound of the marks are distinct, so too is the meaning of the marks. There simply can be no legitimate debate that Applicant's Mark, conveys a meaning that is clearly distinct from the mark of "Convert-A-Tub".

The distinction in commercial meaning between Applicant's mark and the Competing Marks are more than sufficient to remove any slight similarity that could cause confusion in the marketplace. Such dissimilarities have been found to allow registration of competing marks even though the marks are used for the same goods or services. *Colgate*, 432 F.2d at 1400.

#### **IV. THE REGISTERED MARKS ARE NOT FAMOUS.**

Another DuPont factor to be considered by the Examining Attorney is the fame of the senior mark. While this is a difficult factor to objectively quantify, the Applicant is unaware of any major advertising campaign regarding "Convert-A-Tub" Registration No. 2394930. Indeed, outside of the Pensacola, FL area, it does not appear that the Competing Mark has any market penetration. In short, it does not appear that Competing Mark has gained any significant fame or notoriety which would entitle it to a greater are of exclusivity. *See C.P.G. Products Corp. v. Perceptual Play, Inc.*, 221 USPQ 89,90 (TTAB 1198).

#### **V. CONCLUSION**

In sum, the Applicant requests that the Examining Attorney reconsider the DuPont factors and considerations discussed above in determining the likelihood of confusion; particularly the distinctiveness of appearance and commercial impression associated with each mark, and allow the Applicant's mark to proceed to publication and registration. The purpose of the Lanham Act is to protect the consumer from confusion in the marketplace. Given the dissimilarity of the marks, a consumer in the marketplace would not likely be confused by Applicant's mark and the Competing Mark.

Reconsideration of the application as amended respectfully is requested. For the foregoing reasons, it is submitted that the present application is in condition for publication and registration and such action is required. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any resulting registration therefrom.

Respectfully submitted,

By: /s/ Donald W. Hudspeth

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# **EXHIBIT A**



## Bathtub to Shower Conversions

### Convertabath™ Insert

### Shower Door Enclosures

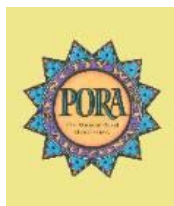
### Resurface & Repair Showers, Tubs, Tile, and Vanities

### Kitchen Counter Tops in Faux Granite



With over 20 years of home improvement experience we can transform any bathroom into a stylish space that is functional and safe.

Customers are pleasantly surprised at just how inexpensive and quickly a project can be completed. Let our experienced staff turn your bathroom into a great space.



623-444-6657

480-656-1348

Call today for a free, no obligation estimate.

We proudly serve the entire Phoenix Metropolitan area.

AZ ROC License #237146





The Convertabath™ Insert Kit  
 Is Now Available!



You are now able to convert your tub into a  
 walk-in shower yourself, using basic hand  
 tools, and it's only \$395.00!

Before you receive your kit, you will be sent a template to determine the  
 size needed for you specific bathtub. Every Convertabath™ Insert Kit

includes a "How To" DVD and instructions. It's that easy!

A typical installation should take 2-3 hours for your first kit. Virtually any type of tub can be converted; including cast-iron! An insert requires few tools and a Convertabath™ technician is available to answer any specific questions you might have. If you or a family member aren't handy, you can use a local handyman service for the installation.





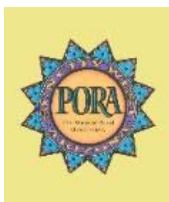
There are several ways to convert your bathtub to a walk-in shower.

Converting your existing bathtub into a shower will cost thousands less than a traditional remodel.

There is a style to fit everyone's needs, taste and abilities.

Any bathtub can be converted, even cast iron, in less than a day.

Click on the pictures below to see just some of the styles available.



This is an example of a "Full Cut" Convertabath™. We remove the entire front of your bathtub and make it a traditional walk-in shower with sliding doors.

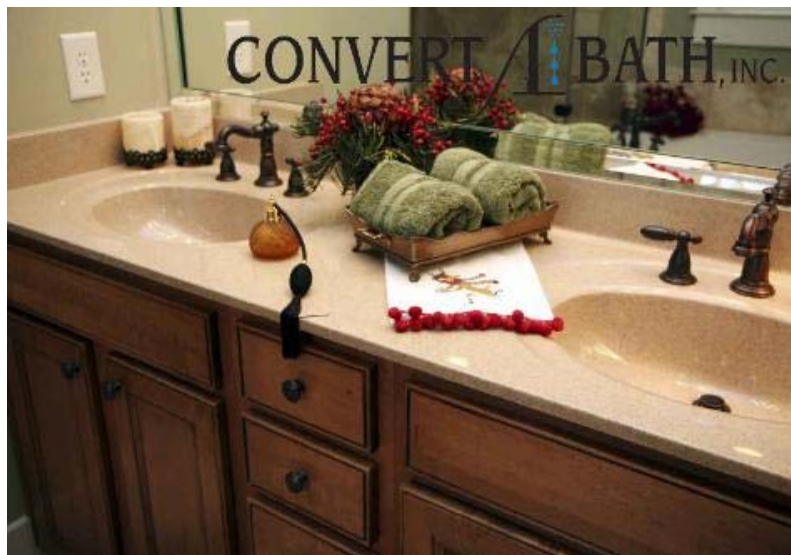
The Convertabath™ Insert is a form fitted unit that simply drops into the front of the bathtub.



The "Notch" cut Convertabath™ converts the bathtub



into a walk-in shower by 480-656-1348. We have a variety of products  
and installing a swing style door. Grab bars, seats and anti-slip are just a  
placed in the center of the tub or moved to the side for your bathroom.  
allow the door swing to clear obstacles such as the toilet.

[Home](#)[Conversion Gallery](#)[Resurfacing](#)[Countertops](#)[Tub & Shower Enclosures](#)[Do It Yourself Insert](#)[Showroom & Contact Us](#)

Bathroom vanities and kitchen countertops can be resurfaced in a solid color or a faux granite. We can repair any damage and apply a new durable surface that is food safe and very scratch & burn resistant. We have a large selection of colors available to satisfy any taste and decor.



480-656-1348

Call today for a free, no obligation estimate.  
We proudly serve the entire Phoenix  
Metropolitan area.

# CONVERT BATH<sup>TM</sup>, INC.

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It literally costs thousands of dollars to remove and replace bathroom components. We are able to repair and refinish just about any bathroom surface for a fraction of the replacement cost. The before and after photos are examples of work we perform everyday.



We can easily change the look of any surface with a  
480-656-1348  
spray on finish that is not only durable, but beautiful

Call today for a free, no obligation estimate as well. These finishes look great in showers, on

We proudly serve the entire Phoenix  
Metropolitan area.





We offer a large selection of custom and stock enclosures to fit your style and budget. Today's bath enclosures offer a beautiful look and have an improved design for cleaning and maintenance. We also offer contractor pricing for the "Do It Yourself Cash & Carry"



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Call today for a free, no obligation estimate.  
We proudly serve the entire Phoenix Metropolitan area.

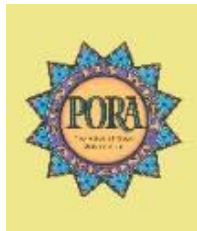


# CONVERT A BATH, INC.

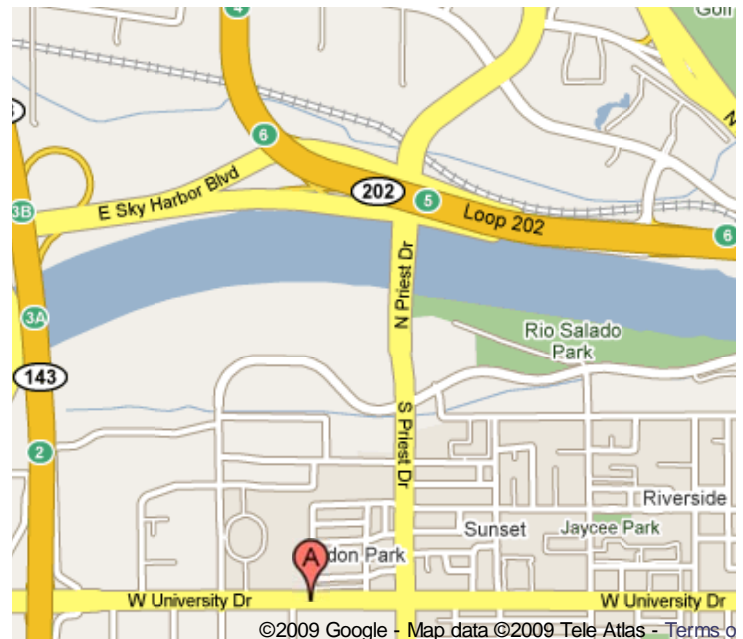
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## **EXHIBIT B**

# CONVERT-A-TUB™

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## Convert-A-Tub Whirlpool Systems

**Kits that convert your existing bathtub into a whirlpool!**



- **Convert your existing bathtub without removal**
- **Half-day installation**
- **10 year warranty on pump and parts**

Using your existing bathtub, you can have a luxurious home spa whirlpool, providing hydrotherapy and body massaging jets to soothe sore muscles and relieve arthritis, backaches and knee and foot discomforts. Our whirlpool jet systems can be installed in fiberglass, acrylic, cultured marble, as well as steel and cast iron bathtubs.

Converting your existing bathtub requires an access for the whirlpool pump and hydro-jets. The whisper quiet pump needs to have a GFCI outlet to a 15 amp 110 circuit. Your bathtub does not need to be removed. The whirlpool venturi jet bodies can be retrofitted into the recesses of your tub. Installation is even easier if you are remodeling and have the tub outside the wall. However, our kit tools provide you the assistance needed to convert your tub without removal. Installation can be done by a DIY (Do-it-Yourselfer) in 4-6 hours. Printed instructions are included; an instructional CD is available for \$5. The parts and pump include a 10-year limited manufacturers warranty.

Our kit includes everything you need except the hole saws – that can be purchased at your local hardware store. Furthermore, a heater may also be installed at the discharge top of the pump. This heater maintains the water temperature drawn into the tub for an hour. Several colors of adjustable jets, which control the air and water pressure, are available. Your home spa for therapy and relaxation has finally become affordable. Call us today with your order of 4, 6 or 8 jets.

**Convert-A-Tub, Inc.**  
**437 Elcino Dr**  
**Pensacola, FL 32526**  
**1-800-291-2882**  
**850-458-5019 Fax**

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## Contact Us



### Convert-A-Tub, Inc. Whirlpool Systems

437 Elcino Dr  
Pensacola, FL 32526  
1-800-291-2882  
850-458-5019 Fax

[info@convertatub.com](mailto:info@convertatub.com)

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# CONVERT-A-TUB™

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## About the Kit



Our kit includes everything that you need except the hole saws.\*

- Whirlpool Jet Pump/Motor
- Venturis
- Jet Heads
- Double Check Valves (aerators)
- Jet Eyes
- Suction Head, Elbow and Cover
- Tools
- Hose (not pictured)  
Complete set of 1" and 1-1/2" Flex Hose
- On/Off Button and Air Hose
- Silicone, PVC Primer and Glue
- 4 page printed instruction and diagrams



Pump, adjustable stand and unions

\*Hole saws are available at major home improvement/hardware stores. For steel or cast iron tubs, ask about our hole saw rentals.

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## FAQ *Frequently Asked Questions*

1. ***Can the system be installed in my tub?***

Yes, this system can be installed in fiberglass, acrylic, plastic, cultured marble, steel or cast iron tubs.

---

2. ***How long does it take to install?***

Approximately 4-6 hours.

---

3. ***How about the electric?***

The pump needs to have its own GFCI. You will need a 110 circuit/15 amps.

---

4. ***How many jets does it have?***

The kit comes with 4, 6 or 8 jets but all of our kits are custom packed so you can have any number of jets.

---

5. ***Does my tub need to be removed?***

No, this system is retro-fitted into your existing bathtub. Most of the parts are placed in the recesses of your tub. No messy remodeling is necessary!

---

6. ***Is there a choice of jets?***

Yes, we have several styles of jets and color choices.

---

7. ***How easy is it to install?***

We have both written instructions and a 31 minute instructional CD to help with installation. Do it yourselfers find it easy to install.

---

8. ***Is there a help line?***

Yes, call 1-800-291-2882 for installation assistance during regular weekday business hours.

---

9. ***How do I order a kit?***

Call 1-800-291-2882 and place your order. You will need to tell us what material your tub is made of. We accept all major credit cards.

---

10. ***Are there any installers in my area?***

We do know installers in other areas. Contact us with your location.

---

11. ***How about a warranty?***

The plastic parts and the pump are guaranteed for 10 year limited manufacturers warranty.

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## Picture Gallery

*Before*



*After*



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## Kit (Do-It-Yourself) Pricing

	4 jet	6 jet	8 jet
Plastic jets			
White, bright white, bone, biscuit	\$299	\$329	\$399
Metallic finishes	\$359	\$429	\$529

The 4 and 6 jet kit comes with a 1 HP (5.5 amps) pump.

The 8 jet kit comes with a 1.25 HP (7.2 amps) pump.

Heaters (12 amps – needs its own circuit) that maintain the water temperature are \$135.

Shipping is included. A Training CD video is available for \$5.00 with kit purchase. Video is not sold by itself.

Return Policy: Returns are allowed up to 21 days from the ship date. A 20% restock fee will apply. Freight charges are not refundable. After 21 days, no returns are allowed.

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# CONVERT-A-TUB™

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## About Us



Convert-A-Tub has been a distributor of whirlpool parts since 1986. VICO, the original whirlpool manufacturer in the US, had been manufacturing whirlpool parts and [pumps](#) since 1961. VICO has been sold to Pentair and Balboa. Our customers include bathtub refinishers, cultured marble manufacturers, [mobile](#) home dealers and do-it-yourselfers.

We offer a full line of whirlpool parts and pumps. Each kit is custom packed to fit your individual needs and shipped the same day you order!

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